

1 THE HONORABLE JOHN C. COUGHENOUR  
2  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 U.S. BANK, N.A.,

11 Plaintiff,

v.

12 THE GLOGOWSKI LAW FIRM, PLLC, d/b/a  
13 ALLEGIANT LAW GROUP, and KATRINA  
14 GLOGOWSKI,

Defendants.

CASE NO. C19-0074-JCC

ORDER

15  
16 This matter comes before the Court on Plaintiff's motion for summary judgment (Dkt.  
17 No. 84), Defendants' motion for summary judgment (Dkt. No. 88), and Defendants' motion to  
18 file an overlength brief (Dkt. No. 82). Having thoroughly considered the parties' briefing and the  
19 relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and  
20 DENIES in part the motions for summary judgment (Dkt. Nos. 84, 88) and DENIES as moot the  
21 motion to file an overlength brief (Dkt. No. 82) for the reasons explained herein.

22 **I. BACKGROUND**

23 This is a legal malpractice action. (*See generally* Dkt. No. 36.) U.S. Bank alleges that  
24 Katrina Glogowski and the Glogowski Law Firm, PLLC, d/b/a Allegiant Law Group  
25 (collectively "Defendants"), breached their professional duties and their agreement with U.S.  
26 Bank when they inadequately represented U.S. Bank in foreclosure actions and related matters

1 regarding properties in Seattle, Washington (the “Erickson property”); Salem, Oregon (the  
2 “Patten property”); and Lake Oswego, Oregon (the “Cohen property”). (*Id.*)

3 Defendants counter they were not paid for services they provided to a U.S. Bank  
4 contractor, Asset Foreclosure Services, now known as Peak Foreclosure Services. (*See* Dkt. No.  
5 40 at 12–14.) Defendants argue that because U.S. Bank benefitted from those earlier services, it  
6 is liable for Peak Foreclosure’s nonpayment. (*See* Dkt. No. 40 at 12–14.) Defendants assert  
7 counterclaims for breach of contract, quantum meruit, and unjust enrichment. (*Id.*)

8 U.S. Bank seeks summary judgment on all claims and Defendants seek summary  
9 judgment solely on U.S. Bank’s claims. (*See generally* Dkt. Nos. 84, 88.) Defendants also move  
10 for leave to file an overlength motion for summary judgment. (Dkt. No. 82).

## 11 II. DISCUSSION

### 12 A. Choice of Law

13 The statutes of limitations for legal malpractice claims in Minnesota, Washington, and  
14 Oregon vary substantially, *compare* Minn. Stat. § 541.05 (six years), *with* Wash. Rev. Code  
15 § 4.16.080 (three years) and Or. Rev. Stat. § 12.110 (two years). Defendants argue that, to the  
16 extent Washington or Oregon’s shorter statute of limitations applies to U.S. Bank’s malpractice  
17 claims, they would be time-barred. (Dkt. Nos. 88 at 10–11, 93 at 7–8.)

18 Defendants signed U.S. Bank’s engagement letter on October 22, 2014. (*See* Dkt. No. 87  
19 at 10–41.) It “govern[s] all services provided to and conducted on behalf of U.S. Bank” and  
20 contains a choice-of-law clause indicating that its terms should be “governed by and construed  
21 and enforced in accordance with the laws of the State of Minnesota, without regard to its conflict  
22 of law principles.” (*Id.* at 10, 20.)

23 This Court, sitting in diversity, applies Washington’s choice-of-law rules. *See Downing v.*  
24 *Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). Those rules provide that the Court  
25 must engage in a conflict-of-laws analysis if an actual conflict exists between the laws or  
26 interests of Washington and the laws or interests of another state. *Erwin v. Cotter Health*

1     *Centers*, 167 P.3d 1112, 1120 (Wash. 2007). Except in limited circumstances, if a conflict of law  
 2 exists and the parties selected the governing law, the Court enforces that agreement. *See McKee*  
 3 *v. AT&T Corp.*, 191 P.3d 845, 851 (Wash. 2008). However, this is not the case for “tort claims  
 4 arising out of the contract.” *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1066  
 5 (Wash. 1987). Instead, the parties’ agreement is a consideration “in the most significant  
 6 relationship test.” *Id.*

7                 Under the most significant relationship test, the Court looks to relevant contacts, such as  
 8 the place of contracting, the place of performance, and the domicile of the parties. *Mulcahy v.*  
 9 *Farmers Ins. Co. of Wash.*, 95 P.3d 313, 317 (Wash. 2004). “These contacts are to be evaluated  
 10 according to their relative importance with respect to the particular issue.” *Id.* Here, the relevant  
 11 contacts favor the application of Minnesota’s statute of limitations. First and most importantly,  
 12 this is consistent with the engagement letter. (*See* Dkt. No. 87 at 10, 20.) When interpreting an  
 13 agreement, the Court focuses on “the actual words used.” *Hearst Commc’ns, Inc. v. Seattle*  
 14 *Times Co.*, 115 P.3d 262, 267 (Wash. 2005). The words used in this instance, agreed to by  
 15 sophisticated parties, provide that Minnesota law would apply. Second, no single jurisdiction has  
 16 the majority of contacts regarding Defendants’ services to U.S. Bank because Defendants  
 17 provided legal services to U.S. Bank in various states, including Alaska, Oregon, and  
 18 Washington. (Dkt. No. 85-1 at 9–10.) Third, U.S. Bank is a Minnesota-based corporation—it  
 19 negotiated its agreement with Defendants for services rendered in Minnesota and incurred its  
 20 alleged injuries in Minnesota. (*See* Dkt. Nos. 36 at 3, 95 at 4.)

21                 The Court does not find Defendants’ argument, that Washington’s statute of limitations  
 22 cannot be overridden by a generic choice-of-law provision requiring the application of  
 23 Minnesota law, persuasive. (*See* Dkt. No. 97 at 4.) As the Ninth Circuit stated in the case  
 24 Defendants rely on, the statute of limitations of the desired forum can apply in circumstances  
 25 where that forum would otherwise be unavailable to a plaintiff. *See In re Sterba*, 852 F.3d 1175,  
 26 1178, 1180–81 (9th Cir. 2017). Here, the Minnesota forum would be unavailable to U.S. Bank

1 because Defendants are citizens of Washington and provide the Court no assurance that they  
2 would be subject to a court's personal jurisdiction in Minnesota. (See Dkt. No. 36 at 3.) Without  
3 this assurance, it would be inequitable for this Court to ignore the parties' clear choice-of-law  
4 provision.

5 Accordingly, the Court finds that Minnesota law applies.

6 **B. Defendants' Motion to File an Overlength Brief**

7 Defendants moved for leave to file an overlength motion for summary judgment (Dkt.  
8 No. 82) and U.S. Bank asked the Court to strike the overlength portion of Defendants' motion.  
9 (See Dkt. No. 95 at 13–14.) At issue are six pages within Defendants' motion containing  
10 arguments based on Washington law supporting summary judgment on U.S. Bank's breach of  
11 contract claims. (See Dkt. No. 88 at 24–30.) But, as discussed above, the parties' agreement for  
12 legal services contains a clear choice-of-law clause that requires the application of Minnesota  
13 law to this dispute. (See Dkt. No. 87 at 20.) Therefore, the Court need not address the parties'  
14 requests because the pages at issue in Defendants' motion are not relevant in considering the  
15 merit of U.S. Bank's breach of contract claims under Minnesota law. Accordingly, Defendants'  
16 motion to file an overlength brief (Dkt. No. 82) is DENIED as moot.

17 **C. Legal Standard – Motion for Summary Judgment**

18 "The court shall grant summary judgment if the movant shows that there is no genuine  
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.  
20 Civ. P. 56(a). Material facts are those that may affect the outcome of the case, and a dispute  
21 about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a  
22 verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).  
23 In deciding whether there is a genuine dispute of material fact, the Court must view the facts and  
24 justifiable inferences drawn from them in the light most favorable to the nonmoving party. *Id.* at  
25 255. The Court is therefore prohibited from weighing the evidence or resolving disputed issues  
26 in the moving party's favor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

1       “The moving party bears the initial burden of establishing the absence of a genuine issue  
 2 of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “If a moving party fails to  
 3 carry its initial burden of production, the nonmoving party has no obligation to produce anything,  
 4 even if the nonmoving party would have the ultimate burden of persuasion at trial.” *Nissan Fire*  
 5 & *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But once the moving  
 6 party properly supports its motion, the nonmoving party “must come forward with ‘specific facts  
 7 showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio*  
 8 *Corp.*, 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). Ultimately, summary  
 9 judgment is appropriate against a party who “fails to make a showing sufficient to establish the  
 10 existence of an element essential to that party’s case, and on which that party will bear the  
 11 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

12           **D. U.S. Bank’s Malpractice Claims**

13           1. Statute of Limitations

14       As a threshold matter, the Court addresses Defendant’s argument that U.S. Bank’s claims  
 15 are barred by Washington’s three-year statute of limitations on malpractice claims. (*See* Dkt.  
 16 Nos. 88 at 10, 93 at 7–8, 97 at 4–9 (citing *Cawdry v. Hanson Baker Ludlow Drumheller, P.S.*,  
 17 120 P.3d 605, 608 (Wash. Ct. App. 2005).) As discussed above, *see supra* Part II.A., the Court  
 18 relies on Minnesota’s statute of limitations for U.S. Bank’s legal malpractice claim, which is six  
 19 years. *See* Minn. Stat. § 541.05. Therefore, a six-year statute of limitations applies, and  
 20 Defendants do not argue that this term would serve as a bar for U.S. Bank’s claims. (*See*  
 21 *generally* Dkt. Nos. 88, 93.)

22       Moreover, even if Washington’s statute of limitations were to apply, U.S. Bank presents  
 23 sufficient evidence suggesting that, in fact, it did not have adequate notice of the nature and  
 24 scope of its injury from Defendants’ actions on these properties until well after U.S. Bank  
 25 terminated their relationship. (*See* Dkt. No. 95 at 6–7.) In light of Washington’s discovery rule,  
 26 *see Huff v. Roach*, 106 P.3d 268, 269 (Wash. Ct. App. 2005), summary judgment on U.S. Bank’s

1 malpractice claim, based on Washington’s statute of limitations, would also be inappropriate.

2 Accordingly, summary judgment on U.S. Bank’s tort-based malpractice claim based on  
3 the statute of limitations is DENIED.

4           2.       Merits

5           To bring a claim for legal malpractice based on Minnesota law, a plaintiff must establish  
6 (1) the existence of an attorney-client relationship, (2) a negligent act or breach of the parties’  
7 agreement, (3) that this act or breach was the proximate cause of the plaintiff’s injuries, and (4)  
8 but for the attorney’s conduct, the plaintiff would have been successful in the prosecution or  
9 defense of the underlying claim or would have obtained a more favorable result in the underlying  
10 transaction. *See Frederick v. Wallerich*, 907 N.W.2d 167, 173 (Minn. 2018); *Jerry’s Enters., Inc.*  
11 *v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). Defendants  
12 challenge U.S. Bank’s malpractice claims for each of the three properties at issue, taking  
13 exception with whether they breached the relevant standard of care and, if they did, whether that  
14 breach was the proximate cause of U.S. Bank’s injuries. (*See* Dkt. Nos. 88 at 9–24, 93 at 7–19.)  
15 While Minnesota law controls the outcome, the Court looks to local law for the properties at  
16 issue to determine an attorney’s standard of care. Attorneys practicing in Oregon have a duty of  
17 care to “act as a reasonably competent attorney in protective and defending the interests of the  
18 client.” *Pereira v. Thompson*, 217 P.3d 236, 247 (Or. Ct. App. 2009). Similarly, attorneys  
19 practicing in Washington must be “reasonable, careful and prudent” in representing their clients.  
20 *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 324 P.3d 743, 751 (Wash. Ct. App.  
21 2014).

22           a.       *Patten Property*

23           Following U.S. Bank’s foreclosure sale of the Patten property, which resulted in proceeds  
24 exceeding the amount owed to U.S. Bank, U.S. Bank alleges that Defendants improperly pursued  
25 an interpleader action on their behalf, failed to serve the prior homeowner during the interpleader  
26 action, and disbursed the excess funds to an ineligible party. (Dkt. No. 36 at 4, 10–11.) U.S.

1 Bank argues each represents a violation of the relevant standard of care and that the \$14,070.21  
2 in legal fees and \$2,000 settlement payment it incurred to resolve a resulting claim brought by  
3 the prior homeowner was proximately caused by Defendants' negligence. (Dkt. No. 87 at 4.)

4 Defendants admit that they incorrectly captioned the interpleader action to include U.S.  
5 Bank as a party. (*See* Dkt. Nos. 88 at 19, 93 at 8–9; *see also* Dkt. No. 85-1 at 46–47 (deposition  
6 testimony from Defendant Katrina Glogowski describing the caption as "honestly . . . an error.")  
7 They also admit they should have served the former homeowner in the interpleader action. (*See*  
8 Dkt. No. 85-1 at 54 (deposition testimony from Defendant Katrina Glogowski admitting that it  
9 would have been "best practice to serve [the homeowner].").) But they dispute that this error  
10 proximately caused U.S. Bank's injuries, since it decided to "voluntarily settle the case for a  
11 nominal amount." (Dkt. No. 88 at 19.) Reason dictates that these errors were a but-for cause of  
12 U.S. Bank's injuries. They were also, as a matter of law, a proximate cause, irrespective of  
13 whether the distribution of funds to the third party was consistent with Oregon law; U.S. Bank  
14 should not be penalized for attempting to mitigate its injury from Defendants' actions. *See First*  
15 *Bank of Minn. v. Olson*, 557 N.W.2d 621, 624 (Minn. App. 1997) (suggesting such a rule would  
16 "discourage settlement").

17 Accordingly, summary judgment is GRANTED to U.S. Bank on its malpractice claims  
18 relating to the Patten property.

19                   b.     *Cohen Property*

20 U.S. Bank alleges that Defendants failed to serve necessary parties in a foreclosure  
21 proceeding of the Cohen property, namely, the heirs and estate of the decedent whose property  
22 U.S. Bank sought to foreclose on. (Dkt. No. 36 at 4–5, 11–12.) U.S. Bank alleges that, as a  
23 result, it had to pay \$54,284.16 in fees and costs to the revocable trust that held title to the  
24 property. (*Id.* at 12.) It is undisputed that U.S. Bank lost on the issue at trial, that Defendants  
25 believe the court committed reversible error in finding that the estate was a necessary party, and  
26 that U.S. Bank elected not to appeal the ruling. (*See* Dkt. Nos. 84 at 14, 88 at 19–23, 93 at 15–16,

1 95 at 13.) Whether this constitutes actionable malpractice, though, is a function of whether  
 2 Defendants' actions fell below professional norms, irrespective of the trial outcome and, if so,  
 3 whether the trial outcome would have been more favorable absent the deficient performance. *See*  
 4 *Frederick*, 907 N.W.2d at 173.

5 U.S. Bank presents uncontroverted evidence that Defendants were warned by the Circuit  
 6 Court of Oregon that it viewed the estate as a necessary party and believed Defendants should  
 7 have petitioned for the appointment of a personal representative for the estate, yet Defendants  
 8 never cured this deficiency. (*See* Dkt. No. 85-1 at 284.) Nevertheless, Defendants insist they had  
 9 a "colorable argument that the estate was not only unnecessary to the litigation, but also an  
 10 improper party." (Dkt. No. 93 at 16.) Specifically, they argue that the property passed directly to  
 11 the revocable trust upon the grantor's death, such that the estate had no interest in the property  
 12 and, therefore, there was no need to name the estate in the foreclosure proceeding. (Dkt. Nos. 88  
 13 at 22, 93 at 16 (citing Or. Rev. Stat. § 130.001 *et seq.*; *Windle v. Flinn*, 251 P.2d 136, 146 (Or.  
 14 1952))). Further, the parties present dueling expert reports on whether Defendants' actions in the  
 15 Cohen matter fell below the standard for a reasonable attorney practicing in Oregon. (*Compare*  
 16 Dkt. No. 86 at 16–20, *with* 90-1 at 140–43.) This is sufficient to establish a disputed issue of  
 17 material fact. A lawyer does not breach a duty of care simply by asserting a colorable but  
 18 unsuccessful argument. *See Rowlett v. Fagan*, 369 P.3d 1132, 1141 (Or. 2016).

19 Accordingly, summary judgment is DENIED to both parties on U.S. Bank's malpractice  
 20 claims relating to the Cohen property.

21 c. *Erickson Property*

22 Finally, U.S. Bank alleges Defendants did not provide appropriate legal advice or take  
 23 necessary actions to perfect U.S. Bank's title to the Erickson property after U.S. Bank, with the  
 24 assistance of separate counsel, Bishop, Marshall & Weibel ("BMW"), redeemed the property in a  
 25 foreclosure sale. (Dkt. No. 36 at 3–4.) This allowed a third party to obtain title to the property  
 26 through the property condominium owner association's ("COA") subsequent foreclosure sale,

1 requiring U.S Bank to pay the third party \$356,276 to reacquire title. (*Id.* at 6–10.) Primarily at  
 2 issue is whether Defendants’ undisputed failure to seek a sheriff’s deed on the property after they  
 3 inherited the file from BMW and their alleged failure to communicate the status of the file to  
 4 U.S. Bank was a breach of their professional duties to U.S. Bank. (See Dkt. Nos. 84 at 15–17, 88  
 5 at 10–15, 93 at 16–19.) Defendants present sufficient evidence to establish genuine factual  
 6 disputes regarding (a) the nature of their duties on the file, in light of BMW’s earlier  
 7 representation regarding the property and (b) the role that BMW and U.S. Bank’s alleged failure  
 8 to respond Defendants’ requests for information may have played in Defendants’ alleged failure  
 9 to meet their professional obligations. (See Dkt. Nos. 90 at 2, 90-1 at 5, 8–12, 29–30.) Moreover,  
 10 there are also disputed facts regarding causation. It is undisputed that U.S. Bank failed to pay the  
 11 COA fees; failed to notify Defendants that it had been served in the COA’s foreclosure action,  
 12 which led to the third party acquiring title; and failed to mitigate its injury on the Erickson  
 13 property by seeking a sheriff’s deed following Defendants’ termination. (See Dkt. No. 90-1 at 22,  
 14 34.)

15 Accordingly, summary judgment is DENIED to both parties on U.S. Bank’s malpractice  
 16 claims relating to the Erickson property.

17 **E. U.S. Bank’s Breach of Contract Claims**

18 According to Minnesota law, “[a] breach of contract is a failure, without legal excuse, to  
 19 perform any promise that forms the whole or part of the contract.” *Lyon Fin. Servs., Inc. v. Ill.*  
*Paper and Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). To establish breach, a plaintiff must  
 20 prove “(1) the formation of a contract, (2) the performance of conditions precedent by the  
 21 plaintiff, and (3) the breach of the contract by the defendant.” *Thomas B. Olson & Assocs., P.A.*  
*v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008).

24 U.S. Bank argues that Defendants breached their contract by allegedly failing to comply  
 25 with the following provisions in the parties’ engagement letter: (1) an articulation of U.S. Bank’s  
 26

1 reliance on Defendant's professionalism;<sup>1</sup> (2) timeliness, notification, and other obligations  
 2 regarding the handling of third-party funds; and (3) a duty to indemnify. (See Dkt. No. 36 at 15;  
 3 see also Dkt. No. 84 at 19–21 (citing Dkt. No. 87 at 10, 12–14, 22, 25).) The parties seek  
 4 summary judgment on U.S. Bank's claims flowing from these provisions. (See Dkt. Nos. 84 at  
 5 18–21, 88 at 27–29.) For the reasons described below, summary judgment is GRANTED to  
 6 Defendants on U.S. Bank's breach of contract claims.

7           1.       Reliance

8           U.S. Bank first argues that Defendants breached the language in the engagement letter  
 9 describing U.S. Bank's reliance on their professional competencies. (See Dkt. No. 84 at 19.) But  
 10 this language is not a "promise." *Lyon Fin. Servs., Inc.*, 848 N.W.2d at 543. It is an articulation  
 11 of U.S. Bank's reliance on the professional standards Defendants were subject to during their  
 12 engagement. This cannot form the basis of a breach of contract claim.

13           2.       Timeliness, Notification, and Handling of Third-Party Funds

14           U.S. Bank next argues that Defendants violated the engagement letter's provisions  
 15 regarding timeliness, handling of third-party funds, and Defendants' obligation to notify U.S.  
 16 Bank of adverse actions. (Dkt. No. 84 at 19–21.)<sup>2</sup> These allegations are more appropriately used

---

17           1 Specifically, the engagement letter contains the following language in its introductory  
 18 section, i.e., prior to the articulation of terms with separate headings:

19           U.S. Bank relies on [Defendants'] professional competencies and obligations,  
 20 ethical standards, and judgment to ensure that [Defendant's services] are handled  
 21 appropriately and that [Defendants] take[] all steps necessary to protect U.S.  
 22 Bank's reputation and interests during the course of providing the Legal  
 23 Services].

(Dkt. No. 87 at 10.)

24           2 U.S. Bank relies on the following terms:

25           [Defendants] shall commence and complete the Legal Services in a timely manner  
 26 . . . [Defendants] shall keep U.S. Bank apprised of the timing and status of the  
 Legal Services, and shall promptly notify U.S. Bank if at any time it appears that  
 the Legal Services will be subject to significant unanticipated delays.

Third-Party Funds – The Firm shall comply with U.S. Bank's instructions for the

1 to support U.S. Bank's tort-based legal malpractice claims. Under Minnesota law, the attorney-  
 2 client relationship can be established under "a 'contract theory' and a 'tort theory.'" *Veit v.*  
 3 *Anderson*, 428 N.W.2d 429, 431 (Minn. Ct. App. 1988); *see Christy v. Saliterman*, 179 N.W.2d  
 4 288, 293 (Minn. 1970) (in an action brought against attorney for breach of contract the plaintiff  
 5 must prove the existence of an attorney-client relationship.) Defendants' contractual obligations  
 6 regarding the timeliness, notification, and handling of third-party funds are consistent with the  
 7 professional standards established by the relevant governing bodies in Oregon and Washington.  
 8 (See Dkt. Nos. 86 at 11–28, 90-1 at 143–45 (articulation of Oregon and Washington's  
 9 professional standards by the parties' experts).) To the extent that Defendants failed to fulfill  
 10 these obligations, the appropriate claim is a tort-based legal malpractice claim; not breach of  
 11 contract. *See Lyon Fin. Servs., Inc.*, 848 N.W.2d at 544 (discussing the inappropriate use of  
 12 "[e]ngrafting an element of reliance from tort law onto a breach of contract action" which "blurs  
 13 the distinction between the two theories of recovery.")

14           3.       Indemnification

15           U.S. Bank finally argues that Defendants violated the engagement letter's  
 16 indemnification provision by failing to reimburse it for its damages resulting from Defendants'  
 17 allegedly deficient legal services. (Dkt. No. 84 at 21.)<sup>3</sup> But U.S. Bank did not make this

---

18           transmission to U.S. Bank of funds paid by third-parties, such as purchase funds  
 19 or redemption funds from a junior lienholder.

20           In the event there is a claim asserted or legal action brought against U.S. Bank  
 21 that creates exposure to U.S. Bank, the Firm shall promptly notify U.S. Bank. . . .  
 22 If at any time the Firm encounters or learns of any delays, adverse actions, or  
 23 other matters in connection with or involving a foreclosure . . . file that could  
 24 create a risk of regulatory, legal, reputational, or other risk to U.S. Bank, the Firm  
 25 shall promptly notify the U.S. Bank Law Division contact . . .

26 (Dkt. No. 87 at 12, 22, 25.)

<sup>3</sup> At issue is the following language: "[Defendants] agree[] to defend, indemnify and hold U.S. Bank harmless from and against all claims, liabilities, obligations, demands, action costs and expenses . . . relating to or resulting from [Defendants'] negligence or willful misconduct." (Dkt. No. 87 at 13.)

1 allegation in its Amended Complaint, (*see generally* Dkt. No. 36), and U.S. Bank cannot raise it  
 2 for the first time in a motion for summary judgment, as this “makes it difficult, if not impossible”  
 3 to “know how to defend” such a claim. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th  
 4 Cir. 2000).

5 For the reasons described above, summary judgment is GRANTED to Defendants on  
 6 U.S. Bank’s breach of contract claims.

7 **F. Defendants’ Counterclaims**

8 U.S. Bank also moves for summary judgment on Defendants’ counterclaims. (*See* Dkt.  
 9 No. 84 at 21–24.) In response, Defendants present no evidence to support their counterclaims for  
 10 breach of contract, nor would the Court expect that they could, since the parties seem to agree  
 11 that U.S. Bank did not contract directly with Defendants before their October 2014 engagement  
 12 letter. (*See* Dkt. No. 87 at 10–41.) And Defendants concede U.S. Bank paid the bills that  
 13 Defendants issued for services rendered pursuant to that letter. (*See* Dkt. No. 85-1 at 11–12.) Nor  
 14 do they provide sufficient disputed facts or legal argument to support their quantum meruit and  
 15 unjust enrichment claims. (*See generally* Dkt. No. 93 at 23.)

16 Accordingly, summary judgment is GRANTED to U.S. Bank on Defendants’  
 17 counterclaims.

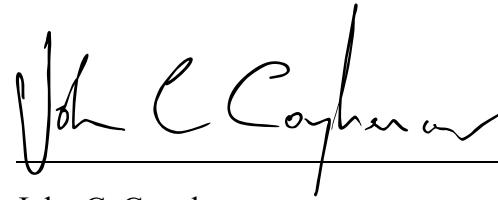
18 **III. CONCLUSION**

19 For the foregoing reasons, U.S. Bank’s motion for summary judgment (Dkt. No. 84) is  
 20 GRANTED in part and DENIED in part; summary judgment is GRANTED to U.S. Bank on  
 21 Defendants counterclaims, which are DISMISSED with prejudice, and on U.S. Bank’s  
 22 malpractice claim solely related to the Patten property. Defendant’s motion for summary  
 23 judgment (Dkt. No. 88) is GRANTED in part and DENIED in part; summary judgment is  
 24 GRANTED to Defendants on U.S. Bank’s breach of contract claims, which are DISMISSED  
 25 with prejudice. Defendants’ motion for leave to file an overlength brief (Dkt. No. 82) is DENIED

1 as moot.

2 DATED this 3rd day of August 2021.

3  
4  
5  
6



---

John C. Coughenour  
UNITED STATES DISTRICT JUDGE